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Via Email and FedEx Overnight

Leslie A. Kirby-Miles
Associate Regional Counsel
U.S. EPA Region 5
77 W. Jackson Blvd. C-14J
Chicago, IL 60604-3590

RE: Portage Creek Time Critical Removal Action at the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund Site

Dear Ms. Kirby-Miles:

I am writing on behalf of NCR Corporation ("NCR") regarding an April 18, 2011 letter from Linda Nachowicz, Region 5 of the Environmental Protection Agency ("EPA"), requesting NCR's participation in what EPA characterizes as a time critical removal action within the Portage Creek Area of the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund Site ("Site"). As I explained when we met on January 13, 2011, EPA's focus on NCR as a potentially liable party at the Site is misplaced; NCR has no Superfund or other liability at the Site. Accordingly, NCR respectfully declines to take part in the planned action referenced in the April 18, 2011 letter.

In our January 13, 2011 meeting, you indicated that the only basis on which EPA seeks to hold NCR liable at the Site is as an "arranger" under § 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). By its plain terms, liability as an "arranger" is limited to persons that "arranged for the . . . disposal" of a "hazardous substance" at a facility where that hazardous substance has come to be located. 42 U.S.C. § 9607(a)(3). The Supreme Court's recent decision in *Burlington Northern & Santa Fe Ry. v. United States*, 129 S. Ct. 1870 (2009), clarified the limited scope of "arranger liability." The Supreme Court held that, because "the word 'arrange' implies action directed to a specific purpose," an entity may qualify as an arranger only

when it "*plan[s] for*" or "*takes intentional steps to dispose* of a hazardous substance" at a site. *Id.* at 1879-80 (emphases added and internal quotation marks omitted).

Of keen importance, the "intent" must be connected to the actual disposal mechanism: "In order to qualify as an arranger, [the arranger] must have entered into the sale of [the product] with the intention that at least a portion of the product be disposed of . . . by one or more of the methods described in [42 U.S.C.] § 6903(3)." *Id.* at 1880. The progeny of *Burlington Northern* underscore that under current law even a party's knowledge of a potential disposal – which NCR does not concede is present here – is itself insufficient to constitute arranger liability absent a specific intent that the hazardous substance contained in the product sold be discharged to the environment.[1]

NCR had no connection to the disposal of polychlorinated biphenyls ("PCBs") at the Site that would remotely meet this intent requirement – a requirement established by the Supreme Court. NCR and its corporate predecessors developed and sold carbonless copy paper ("CCP"), which contained PCBs in an emulsion. A small portion of the production, known as "broke," consisted of cuttings or trim that could not itself be sold as CCP rolls. Broke was nevertheless a useful product sold to various independent intermediaries and entrepreneurs, known as brokers, who were in the business of buying recovered fiber for resale to recycling mills for use in the manufacture of new paper products. A regular and established market existed for CCP broke, and NCR in no respect paid or otherwise arranged with others to dispose of broke; instead, the broke was actively sold, and then resold for further use, and ultimately millions of consumers used the resulting products. It strains credulity to suggest broke was anything but a useful and valuable product.

In any event, EPA's indicated basis for attempting to hold NCR liable fails at the first step, because there is no credible evidence that any broke from any facility owned or operated by NCR was ever purchased or recycled by any facility at or near the Site.[2]

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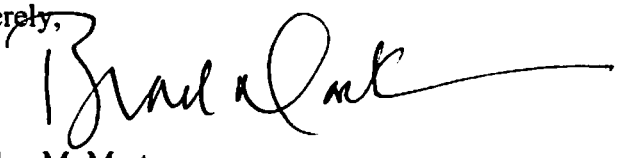
[1] *See, e.g.*, *Schiavone v. Ne. Utils. Serv. Co.*, No. 3:08CV429, 2011 WL 1106228, at *5-6 (D. Conn. Mar. 22, 2011) (holding defendants not liable as arrangers because, although defendants may have had specific intent to dispose of used transformers and knowledge that the used transformers contained oil, plaintiffs failed to show defendants' "purpose in their dealings [was] disposing of transformer oil containing PCBs"); *Team Enters., LLC v. W. Inv. Real Estate Trust*, 721 F. Supp. 2d 898, 903-05 (E.D. Cal. 2010) (manufacturer of dry cleaning equipment designed to discharge hazardous substances to the environment not liable as arranger because manufacturer did not install or control operation of equipment); *Hinds Invs. v. Team Enters, Inc..*, No. CV F 07-0703 LJO GSA, 2010 WL 922416, at *5 (E.D. Cal. Mar. 12, 2010) (potential knowledge of hazardous substance disposal at dry cleaning site insufficient without intent that such disposal occur).

[2] At our January 13, 2011 meeting, the only evidence that EPA referred to is a May 19, 1965 letter purportedly written by Fred "Bud" Heinritz. You are already familiar with the evidentiary deficiencies of the authenticity of the Heinritz letter, including among other things its Wisconsin author's disavowal of the British spellings and the signature format of the letter. In any event the Heinritz letter, even if the evidentiary issues are set aside, does not evidence any "intent to dispose."

Even if such evidence exists, a conclusion for which EPA has offered no reason to believe, the simple fact remains that any transactions between independent third-party brokers and mills at the Site are not associated with NCR. If any brokers sold CCP broke to facilities at the Site, those brokers were not NCR's agents; NCR in no way directed any brokers with respect to the parties to whom they sold nor did they direct the eventual use of CCP broke. Rather, NCR's role in the CCP broke transaction ended at the time the brokers purchased the useful product for resale. NCR thus could not have been "planning for" or "taking intentional steps" to dispose of CCP broke, let alone a hazardous substance, at the Site.

During the twenty-some years that investigation and cleanup activities have been ongoing at the Site, NCR has twice responded to EPA information requests under CERCLA § 104(e). Until now, EPA has not endeavored to involve NCR at the Site, because no credible evidence or legal theory could connect NCR's business practices to releases of PCBs at the Site. NCR is unaware of any new evidence or legal theory that would justify NCR's participation in this or any other cleanup activities at the Site. Please feel free to call me at (206) 292-2604 if you have any questions.

Sincerely,



Bradley M. Marten

cc: Edward Gallagher
Evan B. Westerfield